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The Honorable Jed S. Rakoff
United States District Court
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: ***G&A Strategic Investments I LLC, et al. v. Petróleos de Venezuela, S.A., et al.*, No. 1:23-cv-10766-JSR; *Girard Street Investment Holdings LLC v. Petróleos de Venezuela, S.A., et al.*, No. 1:23-cv-10772-JSR; *Girard Street Investment Holdings LLC v. PDV Holding, Inc.*, No. 1:24-cv-04448-JSR**

Dear Judge Rakoff:

I write in response to Plaintiffs' March 10, 2025 letter describing the purported newly discovered evidence upon which Plaintiffs wish to rely in asserting a claim of fraud or injustice under *Bancec*. As explained in more detail below, Plaintiffs' new theories of fraud or injustice are inadequate under Second Circuit precedent and fail for many of the same reasons that the theories asserted in their complaints failed. Having chosen not to seek leave to replead, Plaintiffs should not be allowed to assert these new theories at summary judgment or trial.

Federal Rule of Civil Procedure 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "Without some factual allegation in the complaint," the Supreme Court has explained, "it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests." *Id.* at 555 n.3.

This Court already has held that Plaintiffs' allegations in support of their fraud or injustice theory do not satisfy this standard, as the Plaintiffs' complaints' allegations "are largely conclusory and do not allege with factual specificity how PDVH's separate legal status has been used to defraud creditors" under Second Circuit precedent. 24-cv-4448 Dkt. 116 ("MTD Op.") at 20. First, PDVSA has not brought any claims in this case, and therefore it has not "asserted claims through a dissolved entity to shield itself from liability." *Id*. at 19 (citing *EM Ltd. v. Banco Central de la República Argentina*, 800 F.3d 78, 95 (2d Cir. 2015) (cleaned up)). Second, this case does not involve "dissolv[ing] a state-owned corporation with unpaid liabilities and replac[ing] it with a

newly created and undercapitalized entity." *Id*. Third, plaintiffs have not alleged that PDVSA "intentionally structured its corporate relationships to 'confound its creditors.'" *Id*.

The Court also specifically held that Plaintiffs' theories of fraud and injustice—(1) that PDVSA committed an injustice by not paying its debts and (2) that assets, including dividends, flowed from PDVH to PDVSA and out of the reach of U.S. courts or to certain of PDVSA's creditors but not Plaintiffs—*Girard Street* Cons. Am. Compl. ¶ 191; 24-cv-4448 Dkt. 59 at 13—are barred by the Second Circuit's decision in *Gater Assets Ltd. v. AO Moldovagaz*, 2 F.4th 42, 62 (2d Cir. 2021), which held that evidence that a sovereign had made certain corporate arrangements with its instrumentality that had "thus far worked to prevent Plaintiff from collecting its judgment" did not show fraud or injustice and that there is nothing "irregular or fraudulent," nor indicative of an "abuse of the corporate form," in an instrumentality of a sovereign "preferring certain creditors" over others. *See* MTD Op. at 19–20.

Plaintiffs pressed these theories throughout the discovery period, and they did not amend their complaints before the time to do so without leave of court expired on December 5, 2024. 24-cv-4448 Dkt. 49 (Case Mgmt. Plan); *see* Fed. R. Civ. P. 15(a) (permitting amendment without seeking leave of court within twenty-one days of a 12(b)(6) motion having been filed). Nor did they seek leave to amend based on evidence obtained in discovery, even after this Court issued its ruling that the complaints did not plausibly allege a claim under a fraud or injustice theory. Indeed, just recently, Plaintiffs' 30(b)(6) witness admitted that the "wrong or injustice" referred to in paragraph 191 of the operative *Girard Street* complaint is [redacted][1] He further admitted that Plaintiffs do not allege that the 2015 dividend [redacted] to them or [redacted].[2] When pressed on what "[redacted]" could constitute a wrong or injustice, the deponent did not identify any other wrong or injustice besides "[redacted],"[3] positing that "[redacted]" (namely the 2015 dividend and 2016 pledges) could amount to a "wrong and injustice [redacted]."[4]

Now that this Court has ruled out the fraud or injustice theories articulated in the consolidated complaint and in Plaintiffs' 30(b)(6) deposition, and only eight days before summary judgment papers are due, Plaintiffs have reversed course: Their new theory is that PDVH is somehow committing fraud or an injustice by deliberately *withholding* dividends from PDVSA (including from the illegal Maduro-controlled PDVSA in Venezuela) so that PDVSA cannot pay its alleged debts to Plaintiffs. Ltr. at 2. Plaintiffs should not be allowed to assert this new theory at this late stage of the case. (In fact, Plaintiffs would have kept silent about their new allegations and theories if not the Court's recent order, and even now they contend that they can present additional new evidence and theories in their summary judgment papers that they did not include in their

[1] [redacted] deposition transcript at 152:2-16 (Feb. 18, 2025) (designated highly confidential).
[2] *Id.* at 150:5-8; 151:3-7.
[3] *Id.* at 156:11-17.
[4] *Id.* at 157:1-6.

letter to the Court, contrary to the Court's direction to present their newly discovered evidence in yesterday's letter. *See* Ltr. at 6 n.26 ("Plaintiffs' summary of evidence for the purposes of this letter is not intended to be comprehensive, and Plaintiffs expressly reserve the right to cite additional evidence in support of the 'fraud or injustice' prong in briefing on their forthcoming motion for summary judgment.").)

Moreover, Plaintiffs' attempt to revive their fraud or injustice claim with purported "newly discovered evidence" is futile.[5] Plaintiffs significantly mischaracterize the evidence and undisputed facts produced in discovery, but even if everything Plaintiffs allege in their letter were true, Plaintiffs still could not state a claim under the Second Circuit's standard. First, Plaintiffs' allegation that the 2019 Venezuelan National Assembly "ordered PDVH to withhold dividend payments to PDVSA" essentially amounts to yet another complaint that PDVSA is not paying its creditors, which, again, does not constitute a fraud or injustice. Plaintiffs' conclusory allegation that the supposed dictate was intended "to ensure that PDVSA could plead poverty to its creditors" and deny creditors "recourse to dividend payments from PDVSA's subsidiaries that would have flowed to PDVSA in the ordinary course," Ltr. at 2, also does not show an abuse of the corporate form under *Gater*. In any event, Plaintiffs ignore that *PDVH is absolutely forbidden by U.S. sanctions from issuing any dividends to PDVSA and has been since August 2017*.[6] It also has been barred since August 2018 from paying dividends by the attachment order entered by Judge Stark in the *Crystallex* litigation.[7] Acting in compliance with federal law and court orders cannot constitute fraud or injustice under *Bancec*.

The absence of dividends to PDVSA since August 2017 has only increased the value of PDVH—and the stock being sold in *Crystallex*. That works no injustice on Plaintiffs or any other creditors of PDVSA. Indeed, the opposite is true. (The notion that it would have been easier for PDVSA's U.S. creditors to recover if PDVH had paid dividends to the Maduro-controlled PDVSA in Venezuela than if any funds available for dividends remained within the PDVH corporate structure is absurd on its face.) Plaintiffs' allegations that the lack of dividends are unjust as *to them* is only an admission that their failure to participate in *Crystallex* was a poor strategic bet. Plaintiffs could have pursued the shares of PDVH in the *Crystallex* proceeding, but they chose not

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[5] Plaintiffs cite Federal Rule of Civil Procedure 15(a) in passing. Ltr. at 7. This Court has discretion to deny leave to amend under Rule 15(a) where the amendments would be futile. *E.g.*, *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007).

[6] Exec. Order. No. 13808, 82 Fed. Reg. 41155 (Aug. 24, 2017), https://ofac.treasury.gov/media/5476/download?inline.

[7] The writ issued by the *Crystallex* court applies to any "rights incident to [] stock ownership" of the shares, such as dividends. *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, No. 1:17-mc-151, Writ of Attachment *Fieri Facias*, ECF No. 95 at 7 (D. Del. Aug. 23, 2018) (requiring the U.S. Marshal, as Garnishee, to "attach all shares of [PDVH] stock and any other assets or rights incident to that stock ownership belonging or owing to [PDVSA]" to satisfy Crystallex's judgment against the Republic); *see also Alabama By-Products Corp. v. Cede & Co. on Behalf of Shearson Lehman Bros., Inc.*, 657 A.2d 254, 259 (Del. 1995) ("the traditional benefits of stock ownership" include "the right to vote stock and to receive payment of dividends or other distribution upon the shares").

to. The fact that they missed the deadline to participate does not justify trying to blow up the *Crystallex* proceeding by bringing their claims here and feigning that they had no other recourse.

Second, Plaintiffs offer a suite of allegations that certain PDVH subsidiaries used funds owed to PDVSA or PPSA to pay certain of PDVSA's creditors rather than Plaintiffs. Ltr. at 2–3. Plaintiffs mischaracterize these transactions as PDVSA "selectively accessing its subsidiaries' funds" for its own use, but even if Plaintiffs' mischaracterizations were accepted as true, this would show at most preferential payments to creditors, which is not an abuse of the corporate form. *See Gater*, 2 F.4th at 62 (rejecting such allegations as indicative of fraud). In addition, while Plaintiffs claim that these allegations are based on "evidence obtained during discovery," much of the material is not new. The allegations regarding PDV USA and PDV Chalmette, for instance, were lifted directly—in some instances verbatim—from their complaints. *See, e.g.*, *Girard Street* Am. Compl. ¶¶ 102, 103. The Court already has held—after full briefing by Plaintiffs—that these complaints do not plausibly allege fraud or injustice, and repackaging the same allegations as part of a new "theory" is not a valid ground for reconsideration. (It also is not apparent what relevance these allegations have to this action, given that Plaintiffs sued PDVH, not these subsidiaries, nor is it plausible that transactions reviewed and approved by the United States Government would be evidence of fraud or injustice. *See* Ltr. at 4 (citing extensive evidence of OFAC approval of the transactions described)).[8]

Finally, Plaintiffs allude to purported highly confidential information about PDVSA's potential efforts to settle claims against it. Ltr. at 5. Plaintiffs' public discussion (and mischaracterization) of information purportedly derived from highly confidential information is a violation of the protective order and already is causing harm, including through news reports that could affect the *Crystallex* sale process. Regardless, the Court does not need to see these documents or testimony to reject this argument. Efforts to settle claims, all of which failed, at most simply show PDVSA potentially engaging in discussions with some creditors and not others, which is insufficient to show fraud or injustice. Plaintiffs implausibly contend that their purported evidence of "the PDVSA Ad Hoc Board consider[ing] the pros and cons of accessing equity at each level—*i.e.*, PDVH, Citgo Holding, and Citgo—to settle the debt and release the lien" "demonstrate[es] that the Ad Hoc board understood it could access PDVH's assets" at will. That inferential leap is not plausible, and even if it were, it does not show fraud or injustice under Second Circuit precedent.

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[8] Defendants are not aware of any precedent where a court has found fraud or injustice based on actions expressly authorized by the U.S. Government, or based on restrictions imposed by the U.S. Government in the form of sanctions. Such a finding would be antithetical, as OFAC—the U.S. Government office that issued the relevant licenses here—is charged with maintaining U.S. foreign policy interests by administering U.S. sanctions, including through the issuance of licenses. Plaintiffs' allegation that "PDVSA…caused PDVH…to request OFAC licenses for these transactions," Ltr. at 4, is implausible and irrelevant to fraud or injustice. *See Gater*, 2 F.4th at 64 (observing that, under the fraud or injustice prong, an "entity retains its separate juridical status even if it 'assist[s]' the sovereign in achieving the sovereign's 'policies and goals.'"). Plaintiffs also do not explain why the subsidiaries would not themselves want to seek a license to pay down their own debts without violating U.S. law and would instead require a direction to do so.

For the reasons explained above, any amendment of the complaints to pursue a new fraud or injustice theory would be prejudicial and futile. If the Court does wish to allow Plaintiffs to pursue their theory, then Plaintiffs should be required to replead before summary judgment. Plaintiffs suggest that, pursuant to Federal Rule of Civil Procedure 15(b), the Court (after summary judgment, which Plaintiffs assume they will win) "amend the pleadings to conform them to the evidence and to raise an unpleaded issue." Ltr. at 6-7. But the Court's authority to do that comes from Rule 15(b)(2) and only applies where the parties consent to litigate an issue not raised by the pleadings. Fed. R. Civ. P. 15(b)(2); *Luria Bros. & Co. v. All. Assur. Co.*, 780 F.2d 1082, 1089 (2d Cir. 1986) (observing that "the crucial test is whether the parties have consented to litigation of the issue"). As this letter makes plain, Defendants do not consent to litigating fraud and injustice under *Bancec* after the Court already concluded that the complaints failed to state a claim for relief on such basis and after Plaintiffs' March 10 letter showed that amendment would be futile.

Counsel for Defendant PDVSA, Mr. Camilo Cardozo, joins this letter on behalf of his client.

Respectfully submitted,

By: /s/ *Nathan P. Eimer*

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